Supreme Court, U.S.
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No. 80-838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELIZABETH EVANS, ALENA M. STEVENSON, AND JAYNE C. EDDENS, *etc.*,

Petitioners,

VS.

CENTRAL PIEDMONT COMMUNITY COLLEGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR CENTRAL PIEDMONT COMMUNITY COLLEGE IN OPPOSITION TO PETITION

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LISTING OF ALL THE PARTIES IN THE CASE

In addition to the parties above-named in the caption of this case, Richard Hagemeyer, individually and as President of Central Piedmont Community College, and Melvin Gay, individually and as Vice President of Student Services of Central Piedmont Community College, were joined as defendants (See App. to Petition, p. 40). The District Court, however, dismissed all claims against them; such dismissal was not appealed; and they did not appear in the Court of Appeals.

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

I.

COUNTERSTATEMENT OF THE CASE

In this nonjury case, the United States District Court for the Western District of North Carolina adopted, practically verbatim, the Title VII plaintiffs'[1] proposed findings of fact and conclusions of law, which culminated in conclusions that their employer, Central Piedmont Community College,[2] had discriminated against them and a class of its female employees because of their sex. These ultimate conclusions were premised upon the Employees' nonspecific, conclusionary proposed findings to the effect that they had been

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[1] Elizabeth Evans, Alena M. Stevenson, and Jayne C. Eddens, Petitioners in this case, hereinafter the "Employees".

[2] The Respondent, hereinafter the "College".

subjected to disparate treatment in the terms and conditions of their employment and that the College's application of a "process management" concept was "a pattern and practice of discrimination against women". Upon such findings and conclusions, the District Court granted injunctive relief, attorneys' fees and costs to the Employees and a certified class and mandated backpay proceedings.

On appeal to the United States Court of Appeals for the Fourth Circuit, the College contended: (1) That the evidence either failed to support findings from which employment discrimination might be inferred or failed even to suggest that legitimate, non-discriminatory reasons articulated for management decisions were, in fact, pretextual; and (2) That there was no evidence of any pattern or practice of subjecting female employees to disparate treatment nor any proof that any employment

policy or practice disproportionately affected female employees. Upon these contentions, the College submitted the ultimate issue on its appeal: Were the trial court's findings and resulting conclusions unwarranted, in that they "were unsupported by substantial evidence or were flatly contradicted by admitted and uncontested facts"?

Upon this ultimate issue, the Court of Appeals agreed with the College's contentions, holding "that the evidence adduced at trial did not warrant a finding that Central Piedmont violated Title VII".

> "No substantial legal issues are presented on this appeal. The only question is whether the facts warrant a finding of sex discrimination. The standards are well known. See Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas [Corp. v. Green, 411 U.S. 792 (1973)]. The burden is on the [Employees] to prove that the [College] has violated Title VII. This may be accomplished through presentation of evidence that warrants an inference of sex discrimination.

> . . . The several instances of sex discrimination charged in this case either failed to establish a prima facie case, or, having done so, are sufficiently rebutted by [the College's] articulation of legitimate reasons for its behavior. There is no evidence of pretext" (App. to Petition, pp. 41-42).
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> . . .
>
> "If the court thought that [process management] positions should be reclassified as supervisory, there was no disparate impact upon women since more men than women would have been advanced in responsibility and compensation" (App. to Petition, p. 48).

Accordingly, the Court of Appeals "Reversed" the District Court's judgment and order.

II.

SUMMARY OF ARGUMENT

The Court of Appeals' decision applied settled authority, as clearly enounced by this Court, to the particular facts of this case. The facts included those proved by the College's unrebutted evidence and those established by the

Employees' own admissions, although the Petition resolutely ignores them.

No conflict with decisions of other courts exists upon these facts; no "significant question of federal law" is presented by the Petition; and there otherwise are no "special and important" reasons advising an exercise of this Court's discretion to review this case. Precisely to the contrary, as the Circuit Court affirmatively stated, "no substantial legal issues" have been presented or decided.

Nevertheless, the Petition endeavors to create an illusion of significant legal issues by mischaracterizing both the Circuit Court's decision and the evidence which it reviewed. Thus, the Petition, in Paragraphs 4 and 5 of the "Questions Presented" and in subsequent arguments, suggests that experienced trial and appellate judges, because they did not explicitly refer to Rule 52(a) of the Federal Rules of

Civil Procedure, were not mindful of the well-known "clearly-erroneous" standard for review of a trial court's subsidiary fact-findings. As will be argued below, the Court of Appeals did not even approach the outer limits of its jurisdiction and authority, consistent with Rule 52(a), to set aside erroneous conclusionary findings. And the Circuit Court certainly was not bound to disregard either the Employees' own admissions or unrebutted evidence presented by the College.

Furthermore, the Petition presumes that a "pattern and practice" of sex discrimination was proved, regardless of fatal deficiencies in the Employees' evidence and regardless of uncontradicted evidence that there was no such pattern or practice.

As specified above, the District Court's only findings or conclusions relative to any pattern or practice of sex discrimination resulted from the College's

application of a "process management" concept. There was absolutely no evidence, however, that the process management concept was applied to a greater proportion, or even a greater number, of female employees than male employees. In fact, there was uncontradicted testimony that the concept was applied equally to male and female employees — but to a greater number of male employees — in various job classifications in addition to the clerical classification. As the Court of Appeals observed, "in the record only Evans was said to have been a process manager". And uncontradicted evidence established that the concept applied equally to a male clerical employee whose job was virtually identical to Evans' job.

The District Court did not rely, and could not have relied, upon statistical evidence of a pattern or practice of sex discrimination because the Employees'

statistical evidence was admittedly incomplete and unreliable. The College's unrebutted statistical evidence, on the other hand, tended to prove that the College's female employees were afforded equal employment opportunities and that the percentages of female employees in the College's various job categories were equal to or greater than comparable percentages of females available in the local workforce.

Finally, the Petition utterly mischaracterizes the Circuit Court's rulings in regard to proof of disparate treatment. The Court of Appeals ruled only that the Employees must have presented "evidence that warrants an inference of sex discrimination", citing McDonnell Douglas v. Green, supra (App. to Petition, p. 42 [emphasis added]). Where the evidence did permit an inference of sex discrimination, however, the Circuit Court

found that such evidence was "sufficiently rebutted by [the College's] articulation of legitimate reasons for its behavior" (App. to Petition, p. 42). Indeed, the District Court did not find or conclude that the College's reasons were pretextual.

It is respectfully submitted that the Petition's assertions regarding allegedly improper review of subsidiary fact-findings are frivolous and do not present any grounds for a decision by this Court. Nevertheless, the College will incorporate in its Argument a summarization of the deficiencies in the Employees' evidence.

III.

ARGUMENT

A. The Court of Appeals Applied A Narrow Review Standard

In its holding "that the evidence adduced at trial did not warrant a finding that Central Piedmont violated Title VII" (App. to Petition, p. 41), the Circuit

Court set aside the ultimate "findings" in this employment discrimination case. Those ultimate "findings" necessarily incorporated rulings upon mixed questions of law and fact which, at a minimum, are not under the full protection of the "clearly erroneous" standard (See Shultz v. Wheaton Glass Co., 421 F. 259, 267 (3rd Cir. 1970), cert. den., 398 U.S. 905 (1970); and Official Creditors' Committee of Fox Markets, Inc. v. Ely, 337 F. 2d 461, 467 (9th Cir. 1964), cert. den., 380 U.S. 978 (1965)).

In any event, the Court of Appeals' rulings in this case were well within the clearly erroneous standard. It is reiterated that the issue presented on appeal was whether the findings and conclusions "were unsupported by substantial evidence or were flatly contradicted by admitted and uncontested facts". It is settled law that "if a finding is not

supported by substantial evidence, it will be found to be clearly erroneous" (See Wright & Miller, Federal Practice and Procedure: Civil §2585, p. 735 (1971), and cases cited therein). Additionally, and exactly contrary to the Petition's assertions, this Court in a leading case has held that a finding may be "clearly erroneous" upon review of "the entire evidence", even though "there is evidence to support it". United States v. U. S. Gypsum Co., 333 U.S. 364, 395 (1948).

Moreover, the Circuit Court explicitly and carefully confined its review of this case to the "well known standards" enounced by this Court in respect of "the order and allocation of proof" in an employment discrimination case (See App. to Petition, p. 42, and cases cited therein). The Court below required only that the findings and conclusions be supported by "evidence that warrants an inference of sex

discrimination" (App. to Petition, p. 42). Admissions and glaring deficiencies in the Employees' evidence, however, together with uncontradicted evidence presented by the College, resulted in conclusions that the Employees' proofs "either fail[ed] to establish a prima facie case" or that such proofs were "sufficiently rebutted by [the College's] articulation of legitimate reasons for its behavior" (App. to Petition, p. 42).

It is respectfully contended that these rulings do not suggest any ground or reason for review by this Court.

B. There Was Neither Evidence of a Pattern or Practice of Discrimination Nor Evidence of a Policy or Practice Having a Disparate Impact Upon Female Employees

The only findings or conclusions that the College had engaged in a pattern or practice of employment discrimination because of sex were premised upon a College officer's testimony that certain employees

were considered to be nonsupervisory "process managers". Process managers instructed other employees in the performance of their work and made recommendations concerning hiring, salary, work schedules, discipline and discharge. These recommendations were made "to the supervisor of the worker".

In this testimony, the College officer identified by name several male employees who were considered to be process managers, in that they directed other employees' work but were not considered to be supervisors. The "process management" concept, differentiating between supervision and the direction of work by nonsupervisors, was shown by uncontradicted evidence to apply both to male and female employees, although the witness was able to identify more males.

Among the plaintiffs, "only Evans was said to have been a process manager"

(App. to Petition, p. 48). And uncontradicted evidence established that a nonsupervisory male employee, whose job duties were virtually identical to Evans', was also classified as a clerical employee but was paid less than Evans.

Additionally, well over one hundred of the College's full-time nonsupervisory employees utilized and directed part-time employees. Moreover, the process management concept was applied to employees in various job classifications, including maintenance employees, instructional employees, clerical employees and various others.

Ignoring the foregoing evidence, the Petition presents arguments relative to "an employer's burden in a class action pattern and practice discrimination case" (See Questions Presented, par. 1). This purported issue, of course, begs the question of whether any evidence established a

pattern or practice of discrimination and presumes that there was such evidence. The pattern and practice findings and conclusions and the Petition's arguments, however, are premised upon two monumental assumptions unsupported by any record evidence and, in fact, contradicted by the unrebutted evidence summarized above. The Petition's first assumption is that the process management concept was applied only to clerical employees; the second assumption is that the concept was applied to a higher percentage of female employees than male employees. There was absolutely no evidence supporting either assumption.

There was no evidence that the concept was applied only to clerical employees. There also was no evidence that the concept was applied to fewer than one hundred percent of the College's male clerical employees. Lastly, there was no evidence that the concept was applied to a

greater percentage, or even a greater number, of female employees than male employees. Precisely to the contrary, there was unrebutted evidence that the concept was applied to employees in various job classifications in addition to the clerical classification; that the concept was applied to the only male clerical employee mentioned in the record; and that the concept was applied to a greater number of male employees than female employees.

It is emphasized that there were no findings or conclusions founded upon any statistical evidence of a pattern or practice of sex discrimination. It has been shown that there was no disparate-impact proof. The Employees' individual claims, as shown below, also supplied no proof of any discriminatory pattern or practice.

C. The Court of Appeals Correctly Applied This Court's Decisions Defining the Burden and Allocation of Proof in Title VII Cases

The Circuit Court held that a trial court's findings and conclusions of employment discrimination need only be supported by "evidence that warrants an inference of sex discrimination", citing McDonnell Douglas v. Green, supra (App. to Petition, p. 42 [emphasis added]). McDonnell Douglas, of course, specified the elements of a prima facie employment discrimination case in the context of a refusal-to-hire. In the contexts of various other employment decisions, a prima facie case requires proof of some fact or circumstance from which discrimination could be inferred. In this case, the Court of Appeals reviewed the record for evidence of any such facts or circumstances.

To the extent that the evidence did permit an inference of sex discrimination,

the Court below also reviewed the College's uncontradicted explanations for its actions and concluded that they "sufficiently rebutted" the Employees' evidence (App. to Petition, p. 42). Such review certainly was proper under this Court's decisions.

The Court of Appeals also searched the record for evidence that the College's reasons for its actions were pretextual and concluded that there was no such evidence. This search could only have benefited the Employees, because the District Court had entered no findings or conclusions that the College's explanations were pretextual.

The decision in this case is decidedly not in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in Burdine v. Texas Dept. of Community Affairs, 608 F. 2d 563 (5th Cir. 1979). Here, the Court of Appeals expressly ruled upon the "sufficiency" of the College's explanations for its actions.

Additionally, where the decision herein "assumed" that a "prima facie case of sex discrimination" may have been proved, it also concluded that the College sufficiently had explained its "hiring decision by demonstrating the superior qualifications of the individual hired" (App. to Petition, p. 46).

D. Uncontradicted Evidence and the Employees' Admissions Precluded Any Inference of Discrimination Because of Sex

The following summarizations of admissions and deficiencies in the Employees' evidence and of the College's unrebutted evidence demonstrate the correctness of the decision below.

1. Elizabeth Evans

Evans claimed that she held a "responsible position" but "was not paid accordingly". There was absolutely no evidence that any similarly-situated male employee, at any time or for any reason,

was treated differently than Evans. To the contrary, the evidence established that a male whose duties were virtually identical to Evans' was classified the same as, but paid less than, Evans.

Evans admitted that all of her job functions were clerical, although she stated that she made decisions and helped the College's professional counselors based on information given to her by them. She also admitted that no male employee had ever been preferred over her in the Admissions Office; that she was unqualified for a counselor's job; and that she had never indicated interest in any other job at the College and was not interested in a transfer.

After Evans complained that she was overworked and that other clerical personnel were underutilized, routine clerical functions were transferred from Evans to such other clerical employees. Evans

claimed that this transfer was in retaliation for her discrimination charge. Unrebutted evidence established, however, that a principal element of this 1976 transfer of clerical functions actually had been decided upon in 1975, long before Evans filed her charge. Furthermore, uncontradicted evidence showed that legitimate, non-discriminatory reasons dictated such transfer. Neither Evans' pay, nor any of her benefits, nor her status were affected by the transfer of work.

2. Alena M. Stevenson

Stevenson testified that her only claim of sex discrimination was that the College hired a male, instead of promoting her, in 1976. There was no evidence that any male whose responsibilities were similar to Stevenson's was classified differently or received higher pay. Unrebutted evidence established that Stevenson

received "paraprofessional" pay rather than clerical pay.

The bulk of the evidence pertaining to Stevenson's employment related to a process of negotiating, proposing and counterproposing appropriate job classifications and salaries. And Stevenson ultimately admitted that this process did not involve discrimination against her. Late in 1975, before Stevenson filed her charge of employment discrimination, College officials and Stevenson agreed upon, drafted and solemnly executed a job description for her, which was accompanied by a negotiated salary increase.

As the Court of Appeals concluded, the College's hiring of a male, instead of promoting Stevenson, was based upon relative qualifications. The College articulated definite, substantial, legitimate, and nondiscriminatory reasons for the selection.

There was no evidence that the College's reasons were pretextual.

3. Jayne C. Eddens

Eddens admitted that her entire claim was premised upon a comparison of a new position, into which she was promoted in 1976, with a position that a male had occupied in 1971. Eddens was promoted to her position instead of a male employee after she had been employed for less than a year.

Although Eddens conceded that she had no personal knowledge of the male employee's 1971 employment duties, she admitted that a letter description of his duties, which she had offered into evidence, described two specific job functions that Eddens did not perform. She also admitted it was "possible" that the male employee's job subsequently had been divided into three different jobs.

The College's unrebutted evidence established that the male employee's job had encompassed many more areas of responsibility than were assigned to Eddens in 1976.

4. Sylvia Guion

Guion, who was classified as a "lab instructor" in the College's telecourse center, claimed that she should have been paid as an instructor. She operated the equipment which played video tapes of professional instructors' lectures. These tapes furnished directions and guided the students through a workbook. The televised programs provided remedial or developmental instruction in English, mathematics and reading. Although Guion assisted the students with problems they encountered, her duties were not different from those of other lab personnel who set up their labs and assisted students with problems. From the inception of her employment in the telecourse center, Guion had been told that

students who required additional help should be referred to the professional instructors of the remedial courses. Additionally, an open classroom was staffed by such instructors to assist students.

Lengthy testimony detailed legitimate, non-discriminatory reasons for Guion's classification as a "lab instructor". No employee in any of the College's several laboratories was paid as an instructor. There was absolutely no record evidence that any similarly-situated male employee, at any time or for any reason, was treated differently than Guion.

Guion also testified that she had asked for, but had been denied, supervisory pay, specifying that she had "eight student aides working for me". As shown above, significant numbers of the College's male and female nonsupervisory employees directed the work of part-time employees. There

was, however, no evidentiary indication of disparate impact upon female employees.

5. Margaret Laing

Laing claimed that she discriminatorily had been denied a full-time job in the College's campus television project. She admitted, however, that her male "assistant" quit because he could not get a full-time job. Laing sought to compare her treatment with that afforded a male employee who, in effect, occupied two part-time jobs at the College. That male employee was paid a substantially lower hourly rate than the rate the College paid Laing.

Laing subsequently transferred to the College's Media Services Department. She claimed that, in this department, she was paid less than a male employee who performed identical work. Unrebutted evidence, however, established that the difference had resulted from the schedule that Laing

had chosen for herself. Another female employee in the same job formerly had been paid on precisely the same basis as the male employee. Moreover, during the male's employment, four female employees in the same Division were paid on the same basis as he was paid.

In 1978, Laing applied for a full-time script developer job which the College, at the time, planned to fill. The College's unrebutted evidence established that the position was not filled, because a new supervisor was hired and decided not to employ any additional full-time script developers. At the time, there were three full-time employees in script developer positions, and two of the three were females.

IV.

CONCLUSION

Upon all of the foregoing, Central Piedmont Community College earnestly contends

that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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